Supreme Court, U.S.
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No. 98-797

In The
Supreme Court of the United States
October Term, 1998

AMWEST SAVINGS ASSOCIATION, a Texas state savings and loan association, and HSA MORTGAGE COMPANY,

Petitioners,

v.

STATEWIDE CAPITAL, INC., GAYLE SCHRODER, CLAY STONE, MELVIN POWERS, JOE LONG, and GORDON BEYERLEIN,

Respondents.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Under Texas law, does an agent have an implied right to recover, in its own name, damages suffered by its principal, when

- the agent took no risk and suffered no loss, and
- the principal's damages were caused by the agent's sub-agent and thus are attributable to the agent itself ?

RULE 29.6 LIST

Respondent Statewide Capital, Inc. has no parent company and has no non-wholly owned subsidiaries.

OPINION BELOW

The opinion of the Court of Appeals is reported at 144 F.3d 885 (5th Cir. 1998).

STATEMENT OF THE CASE

The District Court and a unanimous panel of the Fifth Circuit correctly concluded that AmWest failed to prove that it had suffered any damages, and that AmWest was not entitled to pursue, in its own name, any claim for damages which may have been suffered by the FDIC. The opinions of the District Court (App. 19) and the Fifth Circuit (App. 2) accurately set forth the factual background of the case. The key facts are as follows:

- AmWest held the mobile home assets which were the subject of the action as liquidating agent for the FDIC.[1/] (Pet. 3.)

- Respondent Statewide Capital, Inc. bought the assets after making the high bid in a sealed bid auction; the FDIC supervised the auction and approved its result. (App. 22.)

- The FDIC retained outside contractors to conduct a detailed appraisal of the asset package as a whole. (App. 21.)

- Statewide's bid was greater than the fair market value for the asset package as a whole, as established by the FDIC's outside contractors. (App. 23.)

1/ While AmWest now concedes that it was acting as liquidating agent for the FDIC, it came to this position late in the day. AmWest did not try the case on this theory.

- There was no evidence that, but for any act or omission of any defendant, Statewide or anyone else would have bid or paid more for the asset package.

- AmWest took no risk and it suffered no loss. (App. 6, 27.)

- AmWest was not authorized, by the Assistance Agreement or otherwise, to sue in its own name to recover damages suffered by the FDIC.[2/] (App. 7, 8, 35.)

- AmWest's conflict of interest would in any event have disabled it from any attempt to sue on behalf of the FDIC. AmWest's central claim was that the damage was caused by the wrongful acts of Mr. Clay Stone, who was "hired [by AmWest] to manage and dispose of certain covered assets." (Pet. 4.) Because AmWest was the agent of the FDIC for this purpose, and Stone was its sub-agent, Stone's acts or omissions were chargeable to AmWest; it would have been liable to the FDIC for any damage caused thereby; and accordingly it could not have sued on behalf of the FDIC to recover damage caused by its own agent or employee.

[2/] Respondents do not concede that the FDIC — which chose not to sue — was, in fact, damaged. The District Court "seriously question[ed]" AmWest's primary damage theory (App. 30), and it provisionally ordered a new trial because "the jury instructions were fatally flawed on the issue of damages." (App. 42.)

REASONS FOR DENYING THE WRIT

The Petition fails to set forth any "compelling reason" to review the decision of the Fifth Circuit, and indeed there is none. The Fifth Circuit opinion is not in conflict with the decision of any other Court of Appeals. No important federal question is involved.[3] Neither the District Court nor the Fifth Circuit departed from the accepted and usual course of judicial proceedings. At bottom, Petitioners urge this Court to grant *certiorari* to review whether, on this fact-intensive record, the lower courts wrongly applied established principles of Texas law.

There is no substance to AmWest's suggestion that the "lower courts' rulings have particular significance beyond the parties and claims in this proceeding." (Pet. 5.) The facts of this case are highly unusual, if not unique.[4] Rarely does an agent (AmWest) assert the right to sue for damages inflicted on the agent's principal (FDIC) by the agent's own employee (Clay Stone). Nor is there merit to AmWest's assertion that this decision will "totally undermine" the framework for the orderly liquidation of failed financial institutions. The FDIC had the right to sue if it believed it had been damaged. Its right to sue in future cases has not been diminished in any way by the decision herein. The FDIC also had the right

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[3] Indeed, *no* federal question is involved here. This case was originally filed in state court in Texas. It was removed on the basis of federal question jurisdiction arising from issues which are not raised by the Petition. The issues raised in the Petition — the proper construction of the contract and issues of subrogation and collateral source — were and are matters of state law which were tried under the District Court's supplemental jurisdiction.

[4] AmWest and the FDIC themselves recognized that this matter was "unique." (App. 90.)

under the Assistance Agreement to refuse to reimburse AmWest for losses caused by AmWest's own mismanagement, including losses caused by the wrongful acts of its agents and employees. While the FDIC did not exercise this right in this case, its right to do so in future cases remains intact.

AmWest's reliance on *Federal Savings and Loan Ins. Corp. v. Reeves*, 816 F.2d 130 (4th Cir. 1987), is misplaced. In *Reeves*, the Court of Appeals held that the FSLIC could sue to recover damages it had sustained as a result of wrongdoing committed by officers of the failed savings institution (County), prior to its failure. *Reeves*, however, did not hold that the acquiring institution (Metropolitan in that case; AmWest here) could sue in its own name. Nor did *Reeves* involve wrongdoing, after the transfer of assets to the acquiring institution, by an officer of the acquiring institution. Thus, as the Fifth Circuit correctly held, "*Reeves* provides no basis for upholding the jury's damage award in favor of AmWest." (App. 10.)

Finally, the decision below was correct. The lower courts properly applied state law in holding that AmWest suffered no harm, and that the Assistance Agreement did not authorize AmWest to sue on behalf of the FDIC. The FDIC was fully able to protect its own interests, yet it chose not to sue. No further review is warranted.

CONCLUSION

For the foregoing reasons, AmWest's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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